78-757
No.

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

GEORGE P. ECHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
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George P. Echols petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App.A, infra) is reported at 577 F.2d 308(5th Cir.1978).

JURISDICTION

The judgment of the Court of Appeals (App.A, Infra) was entered on July 28, 1978. A timely petition for rehearing and for a hearing en banc was denied on September 21, 1978. (App.B, Infra). The jurisdiction of this Court is invoked under U.S.C.§1254(1).

QUESTION PRESENTED

Whether prior to and after indictment Rule 41(e) of the Federal Rules of Criminal Procedure is an adequate procedural device to insure First Amendment protection for persons indicted under U.S.C.§1462.

STATUTE INVOLVED

18 U.S.C.§1462 provides in pertinent part:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion picture, film, paper, letter, writing, print, or other matter of indecent character shall be fined not more than $5,000 or imprisoned not more than five years or both, for the first such offense and shall be not more than $10,000 dollars or imprisoned not more than 10 years or both for each such offense thereafter.

Rule 41(e), Federal Rules of Criminal Procedure provides in a pertinent part:

> Motion for return of property. A person agrieved by unlawful search and seizure may move district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

STATEMENT

On April 1, 1975, Special Agent J. E. Cox of the Federal Bureau of Investigation (T55) executed a Federal Search Warrant at the Toulouse Theatre in New Orleans, La. (T55-56-58). The film "Cheese" was seized. On April 1, 1975 Special Agent Rick Bakken, of the Federal Bureau of Investigation, executed a search warrant at the Paris Theatre in New Orleans, Louisiana. (T60) There he seized the film "Sweet Agony". On June 5, 1975 - some 65 days later - the indictments were returned against George P. Echols, et al (R. Volume 1, page 1) The defendant was tried in the Eastern

District of Lousiana at New Orleans beginning on July 7, 1977 (T1) and appellant Echols was found guilty on July 11, 1977 (T281).

From the date of seizure of the films in question to a judicial determination of their obscenity, there was a lapse of time of 497 days.

On appeal (United States v. Echols 577 F.2d 308 5th Cir. 1978), a unanimous panel affirmed. Echols' main point on appeal arose out of his supplementary motion to dismiss the indictments (R Volume 2, 416) in which he alleged a denial of procedural due process because of the 65 day delay between the seizure and indictment and arrest plus a 497 day delay from seizure to a finding of obscenity. The Court at page 310 said:

> "In this case an adversary hearing to review the correctness of this seizure was available in the form of a standard pretrial motion to return seized property as authorized by Federal Rules of Criminal Procedure 41 or a motion to quash as authorized by Federal Rules of Criminal Procedure 12."

It is conceded by the appelant Echols that no time did he file a motion to have a judicial determination of the obscenity question prior to trial, nor did he ask the Court to allow him to copy the seized films.

REASONS FOR GRANTING THE WRIT

Some of the Court's statements in its opinion manifest a misapprehension of the

law and are respectfully challenged. The Fifth Circuit on page 310 says that:

> "The relevant films in this case were seized and being held as evidence in a criminal prosecution for interstate transportation of obscene matter. No attempt was made by the Federal Government to stop the showing of any particular film. Rather in this case the seizures of the films were for evidentiary purposes only - not censorship purposes - and the appellant, if he had other copies of the seized film, could have continued running these films. Thus, this is not a situation where the films were seized in order to destroy them or to block their exhibition. Instead this is a situation where single copies of the films were seized for the bonafied purpose of preserving them for evidence in a criminal proceeding."

If applied literally, no seizure would ever be unconstitutional. Cases such as Roaden v. Kentucky, 413 U.S. 496 (1973), would have no application in any fact situation. The government - any government - could proclaim that they were not censoring, they were simply holding the item seized as evidence in a pending criminal trial. This is doubly true in our case since replacement assumes interstate transportation (there had to have been probable cause to believe a Federal crime was being committed or no Federal Search Warrant sould have been issued) with possible heavier penalties. The Court in Roaden

said:

> "In each case of materials seized fell arguably in first amendment protection, and that taking brought to an abrupt halt an orderly and presumtively legitimate distribution or exhibition. The seizing of film and then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a book store."

The problem in our situation is much more acute. It is well to remember that there was a 65 day hiatus between arrest and indictment. This poses insufferable difficulties for Defendant under rule 41(e) insofar as it has been construed by the Fifth Circuit Court of Appeals.

In Hunsucker v. Phinney, 497 F.2d (5th Cir. 1974) as interpreted in Richey v. Smith, F.2d 1239 (5th Cir. 1975), the Court of Appeals set up various prerequisites for bringing a motion under Rule 41(e). If there were no criminal case commenced, the Court said that such actions are governed by equitable principles whether viewed as based on rul 41(e) or on the general equitable jurisdiction of the Federal District Courts. Whether to exercise that jurisdiction in a given case is subject to the sound discretion of the District Court. The considerations listed in Richey and Hunsucker, supra, governing the decision by the District Court whether to exercise this "Anomalous" jurisdiction, would be as follows:

First and perhaps foremost, the question is whether the government agents (in this case agents of the FBI) in seizing the property displayed "a callous disregard for the Constitutional rights of the taxpayer", Hunsucker v. Phinney, 497 F.2d 34 (5th Cir. 1974). Other factors to be considered are whether the Plaintiff has an individual interest and need for the material his attorney seeks; whether the Plaintiff would be irreparably injured by the denial of the return of the property; and whether the Plaintiff has an adequate remedy at law for the redress of his greivance. If the Court of Appeals strictures against having a hearing at all were not strong enough the court later in United States v. Glassman, flatly stated that a motion under 41(e) would not lie for the return of seized films, seized under a warrant where no indictment had been returned.

A prosecutor merely has a search warrant drawn up, signed, and executed, seizes films and then sits on them. Under 18 U.S.C. 1462 and Rule 41 (e) of the Federal Rules of Criminal Procedure, at least in the Fifth Circuit, the defendant has no remedy at all. This is not merely prior restraint with a vengeance. It is final restraint with a vengeance. Appellant Echols would rely primarily on Southeastern Promotions, Ltd. v. Conrad 420 U.S. 546 (1975).

In Southeastern, promoters of "Hair" made application to the City of Chattanooga for the use of the municipal auditorium for presenting the musical. The city refused permission. The District Court

refused a preliminary injunction and temporary restraining order. Some weeks later on a motion by the promoters, a hearing was held by the District Court. They attempted to secure a permanent injunction against the City. After 3 days of testimony, a jury found the musical obscene and the Court denied the petition for injuctive relief.

In reversing the case the United States Supreme Court first distinguished Heller v. New York 413 U.S. 43 (1973), Southeastern, at 557, note 9. The Court then reaffirmed Freedman v. Maryland 380 U.S.51 (1965), in the strongest possible language; see Southeastern at 560 where the Court said:

> "We held in Friedman and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards; first, the burden of instituting judicial proceedings and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured."

In analysing our facts (65 day delay between seizure and indictment and 497 days delay between seizure and any hearing on obscenity), a further contradiction is immediately apparent. The seizure in our case was under warrant. In order to use Rule 41(e) Federal Rules of Criminal Procedure, as a procedural device to satisfy

Southeastern, above, the movant under 41 (e) must carry the burden of proof. See United States v. Tweed,550 F.2d 297 (5th Cir. 1977). Southeastern, however, flatly states that this burden is on the censor. A contradiction again surfaces as to the second rule in Southeastern above. This restraint can be imposed only for a brief time and only for the purpose of preserving the status quo.

It is easy to see why Heller v. New York 420 U.S. 546 (1973) is distinguishable from the facts in our case. First, Heller was a state case. Second, the magistrate who issued the warrant saw the film before he signed the warrant. Third, the defendant was not required to ship another film interstate. Fourth, the trial began some 40 days after seizure.

In all the discussions of the statute under which the defendants were convicted, no one seems to realize there is a fundamental difference between State and Federal prosecution for obscenity. Under 18 U.S.C. 1462 proof of interstate transportation is crucial to the Government's case. Further, if the defendant is convicted a second time, his punishment is doubled. When films are seized in the interstate situations defendants must risk a second offense in order to continue at all. He cannot obtain a copy locally since it must be presumed that in order for a Federal warrant to be issued, a Federal crime is committed ie interstate transportation of the material. He is further stopped from copying the material under the copyright laws contained in Title 17, United States Code. He has no procedural right under 41(e) to bring a motion prior to indictment. If he does, he

must appeal to the sound discretion of the Court, and show irreparable harm. Further, the burden is upon him. Finally and most important he must show "A callous disregard for his constitutional rights".

Appellant would submit that 18 U.S.C. 1462 has no system of procedural due process and that any seizure of presumably First Amendment protected material under this statute pursuant to a search warrant is void as a prior and final restraint and a violation of Appellant's First Amendment rights, or in the alternative the facts in this case show a lack of procedural due process.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

George P. ECHOLS,
Defendant-Appellant.

No. 77-5678

United States Court of Appeals, Fifth Circuit

July 28, 1978

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, GEE and FAY, Circuit Judges.

FAY, Circuit Judge:

The appellant, George Echols, appeals from his conviction of knowingly causing the interstate trasportation of obscene matter under 18 U.S.C. § 1462[1] and 18 U.S.C.§2.[2] He assigns two errors on appeal. The first assignment alleges that the trial court erred in overruling the appellant's motion to dismiss because 18 U.S.C.§ 1462 allows for the seizure of films alleged to be obscene and to have traveled in interstate commerce without providing for an adversary hearing on the question of obscenity before or after the arrest and seizure. The second assignment of error alleges that the seizure of the films was done in violation of the Fourth Amendment. We find no merit in either of these contentions and affirm.

The relevant facts in this case can be set forth briefly on April 1, 1975, films were seized by officers of the Federal Bureau of Investigation from two theatres owned by the appellant. These officers were acting pursuant to a search warrant. The basis for the issuance of the search warrant was an affidavit explicitly describing the contents of some of the films. The

affidavit also set forth information regarding the transportation of these films in interstate commerce. The only reason that such information was known by the affiant was that he had earlier accompanied officers of the local police department in a search of one of the theatres. As an observer during this search, the affiant saw and took note of air bills, airline stickers and stamps on various film cannisters which indicated that the films had traveled in interstate commerce. Soon after the seizure of the films, the appellant was indicted. For a variety of reasons, however, the trial did not take place until July of 1977. On July 11, 1977, after a three day jury trial, the appellant was convicted on two counts of a three count indictment.

(1) The principal argument of the appellant is that there was a 497 day delay between the seizure of films and trial, and, as a result, there was a 497 day delay before any judicial determination of obscenity was made regarding the seized films. According to the appellant, such a delay violates the First Amendment and denied him procedural due process under the Fifth Amendment. The appellant argues that the Supreme Court's decision in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), governs this situation in that it requires any system of censorship to have certain protections including an assurance that any censorship prior to a judicial determination will be imposed only briefly, and that the burden will be on the censor to go to court within a specified brief period of

time and establish the obscenity of the seized material.

We feel that Freedman is inapposite to the facts in the case before us. We are convinced that this case is controlled by the Supreme Court's decision in Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), which dealt with the seizure of one copy of a film for use as evidence in a criminal trial. In Heller, the Supreme Court said:

> This Court has never held, or even implied that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized . . . In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution.

Id. at 488, 93 S.Ct. at 2792.

The relevant films in this case were seized and being held as evidence in a criminal prosecution for interstate transportation of obscene matter. No attempt was made by the federal government to stop the showing of any particular film. Rather, in this case, the seizures of the films were for evidentiary purposes only--not censorship purposes--and the appellant, if he had other copies of the seized films, could have continued running these films. Thus, this is not a situation where the films were seized in order to destroy them or to block their exhibition. Instead, this is a situation where single copies of films were seized for the bona fide purpose of preserving them as

evidence in a criminal proceeding. As explained in Heller:

> If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding.

Id. at 492, 93 S.Ct. at 2795.

Admittedly, seizures of films for evidentiary purposes can have a censorship effect if no other copies are available. A prompt post seizure determination of the obscenity question must be available "at the request of any interested party" in order for such a seizure to be constitutional. In this case, an adversary hearing to review the correctness of the seizure was available in the form of a standard pretrial motion to return seized property as authorized by Fed.R.Crim.P.41 or a motion to quash as authorized by Fed.R. Crim.P. 12. See, e. g. United States v. Sherwin, 539 F.2d 1, 9(9th Cir.1976). The appellant, however, at no time filed a motion to have a judicial determination of the obscenity question prior to trial, nor did he ask the court to allow him to

copy the seized films. Thus, this case is much like the situation in Heller which prompted the Supreme Court to explain:

> (T)he barrier to a prompt judicial determination of the obscenity issue in an adversary proceedings was not the State, but petitioner's decision to waive pretrial motions and reserve the obscenity issue for trial.

413 U.S. at 490-491,93 S.Ct. at 2794.

A prompt determination of the obscenity issue prior to trial was available to the appellant. The appellant waived his right to such a determination by failing to request it via standard motion practice. If, in fact, the seizure of this evidence had a indirect censorship effect, the blame for its continued duration must rest on the shoulders of the appellant.

(2,3) The second error raised by the appellant challenges the validity of the search warrant for one of the seized films. The appellant claims that the fact that the film was shipped in interstate commerce was crucial to the issuance of the warrant for its seixure. This fact was established only because the federal investigator had observed various airline stickers and air bills while accompanying the local police department in their search of the theatre. The federal agent's presence was not specifically authorized by the state warrant. The appellant argues that the federal agent's presence was part of a calculated search for evidence of federal crime which could not be done without a federal search warrant. We reject the appellant's argument. The appellant nowhere attacks the validity of the state search

warrent. The sole issue presented is whether the federal agent could lawfully be present during the proper execution of that warrant. This Court has previously answered this question in the affirmative, and we have emphasized that we do not in any way wish to discourage cooperation between federal and state law enforcement officers. United States v. Sellers, 483 F.2d 37, 44 (5th Cir. 1973). There is one other reason why the trial court properly denied the appellant's motion to suppress the film in question. The appellant's motion came over one year after the trial court had set pretrial motions to be heard and just six days before trial. The facts upon which the motion was based were apparent on the face of the search warrant issued over two years prior to the date that the motion was filed. Accordingly, it was in the trial court's discretion to hold that the motion had not been timely raised as required by Fed.R.Crim.P. 12(f).

The judgment of the district court is AFFIRMED.

Footnotes:

1. 18 U.S.C. § 1462 provides:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce--
>
> (a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or
>
> (b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or
>
> Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful-
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

2. 18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

APPENDIX B

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

September 21, 1978

EDWARD W. WADSWORTH
CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

TO ALL PARTIES LISTED BELOW:

NO. 77-5678 - UNITED STATES OF AMERICA v.
GEORGE P. ECHOLS

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Sally Hayward
Deputy Clerk

cc: Mr. L. A. Weisensee
Messrs. Dennis Jude Dannel
Robert J. Boitmann

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 577 F. 2d 308.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1978. A petition for rehearing was denied on September 21, 1978. The petition for a writ of certiorari was filed on October 23, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 18 U.S.C. 1462, which proscribes the importation of obscene materials and the interstate transportation of such materials by common carrier, violates the First

Amendment and the Due Process Clause of the Fifth Amendment because it does not provide in terms for an adversary hearing to determine whether materials seized under court-authorized search warrants are obscene.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner and International Theaters Unlimited, Inc., were convicted on two counts of knowingly transporting obscene films in interstate commerce by common carrier, in violation of 18 U.S.C. 1462 and 2. Petitioner was sentenced to concurrent terms of one year's imprisonment on each count and a fine of $10,000. The court of appeals affirmed (Pet. App. A).

On April 1, 1975, pursuant to court-authorized search warrants, agents of the Federal Bureau of Investigation seized one film from each of two theaters operated by petitioner (Tr. 55-58, 60). On June 5, 1975, petitioner was indicted on charges of transporting obscene material in interstate commerce by common carrier, in violation of 18 U.S.C. 1462. Petitioner moved to dismiss the indictment on the ground that two allegedly unauthorized persons were present in the grand jury room during the jury's deliberation. On November 25, 1975, the government obtained a superseding indictment naming as defendants both petitioner and International Theaters Unlimited, Inc. Petitioner moved to dismiss this second indictment on the ground that the projectionist who exhibited the films to the grand jury was not authorized to be present during grand jury deliberations (413 F. Supp. 12, 13; 542 F. 2d 948, 950).

The district court dismissed the indictment on the ground that the projectionist was not a "witness under examination" whose presence before the grand jury was authorized by Fed. R. Crim. P. 6(d). 413 F. Supp. 12. The court of appeals reversed and held that the projectionist

was a "witness under examination" within the meaning of the rule (542 F. 2d 948). This Court denied certiorari (431 U.S. 904). Thereafter, petitioner was convicted on two of the three counts in the superseding indictment.[1]

ARGUMENT

Petitioner contends that 18 U.S.C. 1462 is unconstitutional because it does not provide in terms for an adversary hearing on the question of obscenity before or after the seizure of allegedly obscene materials. More particularly, petitioner argues that in this case the delay between the seizure of the films on April 1, 1975 and the beginning of his trial on July 11, 1977, violated the First Amendment and denied him procedural due process under the Fifth Amendment. Petitioner's argument is based on a faulty premise.

This Court has held that there is no absolute right to an adversary hearing before trial in cases where allegedly obscene materials are seized pursuant to a search warrant for evidentiary purposes in a criminal proceeding. *Heller* v. *New York*, 413 U.S. 483 (1973). See also *United States* v. *Pryba*, 502 F. 2d 391 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975). In *Heller* the Court considered and rejected the need for an adversary hearing preceding the seizure of one copy of an allegedly obscene film for use as evidence in a criminal trial. The Court observed that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding" (413 U.S. at 492). The Court reasoned that the temporary and limited restraint imposed by the seizure of a single copy of a film for evidentiary purposes ordinarily will not restrict distribution or exhibition of the film and that the Fourth

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[1]The government dismissed the third count before trial.

Amendment warrant procedure adequately protects against "gross abuses" of the First Amendment interests involved. *Id.* at 493. The Court stated (*id.* at 492-493):

> If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned.

Here, as in *Heller*, the films were seized pursuant to court-authorized search warrants and "for evidentiary purposes only—not censorship purposes" (Pet. App. 3a).[2] Following the seizure, an adversary hearing to review the correctness of the seizure was available on a pretrial

[2]Petitioner's reliance on *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), is misplaced. There the Court was confronted with a permanent refusal to permit performance of the theatrical production "Hair" at a city-owned auditorium or a city-leased theater. The ban was imposed with no prior hearing whatever. In ruling that such a ban violates the First Amendment, the Court distinguished *Heller* and noted that in *Heller* there was not "any form of 'final restraint' in the sense of being enjoined from exhibition" as there was in *Southeastern*. 420 U.S. at 557 n.9. Petitioner's citation of *Roaden* v. *Kentucky*, 413 U.S. 496 (1973), is also inapposite. *Roaden*, decided the same day as *Heller*, involved a warrantless seizure of a film incident to the arrest of the manager of the drive-in theater at which the film was being exhibited. The Court held the seizure unconstitutional, because there had been no prior probable cause determination by a judicial officer and no showing that such a determination was difficult or impossible to obtain before the seizure. Here, by contrast, the seizure of the films was authorized by warrant.

motion to return seized property under Fed. R. Crim. P. 41(e) or a motion to quash under Fed. R. Crim. P. 12. See, *e.g.*, *United States* v. *Sherwin*, 539 F. 2d 1, 9 (9th Cir. 1976). Nonetheless, as petitioner himself concedes (Pet. 4), at no time did he file a motion seeking a judicial determination of the obscenity question before trial or asking the court to allow him to copy the seized films. Petitioner's failure to make such a motion places him in a position like that of the defendant in *Heller*. As the Court there concluded (413 U.S. at 490-491),

> the barrier to a prompt judicial determination of the obscenity issue in an adversary proceeding was not the State, but petitioner's decision to waive pretrial motions and reserve the obscenity issue for trial.

By failing to file pretrial motions, petitioner waived his right to an advance determination on the obscenity issue. *Heller* v. *New York*, *supra*, 413 U.S. at 490-491; *United States* v. *Glassman*, 562 F. 2d 954, 957 (5th Cir. 1977). The court of appeals correctly observed (Pet. App. 5a) that

> [a] prompt determination of the obscenity issue prior to trial was available to the appellant. The appellant waived his right to such a determination by failing to request it via standard motion practice. If, in fact, the seizure of this evidence had an indirect censorship effect, the blame for its continued duration must rest on the shoulders of the appellant.[3]

[3]In his petition for a writ of certiorari, petitioner fails to mention that he did file numerous pretrial motions that accounted in large measure for the delay of which he complains. Following his initial indictment on June 5, 1975, petitioner requested and received an extension of time to file pleadings until October 3, 1975. On October 2, 1975, petitioner moved to suppress all films seized on the ground that the seizures were unlawful. He also moved to dismiss the indictment on the ground that the two-month delay between the seizure of the films on April 1, 1975, and his indictment on June 5, 1975, constituted a prior restraint in violation of the First and Fifth Amendments. On October 31, 1975, the district court granted in part

Petitioner suggests (Pet. 5, 9-10) that the films seized were the only copies in his possession and that their replacement would have subjected him to additional prosecution, because replacement would have required an additional interstate transportation. Petitioner has made no showing, however, that the seizure of the films here precluded their continued exhibition. Had this been the case, petitioner could have informed the district court that no other copies of the films were in his possession. Under this Court's ruling in *Heller*, *supra*, 413 U.S. at 492-493, the district court would then have been required to permit

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the motion to suppress but denied the motion to dismiss. The court stated that "no interested party requested an adversary hearing to determine the obscenity issue" (Memorandum and Order, Oct. 31, 1975). Following the return of the superseding indictment on November 25, 1975, petitioner was arraigned on December 10, 1975. On December 24, 1975, petitioner filed a second motion to dismiss. He argued that the time lapse before his indictment violated his First and Fifth Amendment rights. He also alleged that unauthorized persons were present in the grand jury room. On December 30, 1975, the district court granted petitioner a two and one-half month continuance. On March 9, 1976, the district court dismissed the indictment on the ground that there was an unauthorized person in the grand jury room (413 F. Supp. 12). On November 22, 1976, the court of appeals reversed (542 F. 2d 948), and this Court denied certiorari on May 2, 1977 (431 U.S. 904). On June 30, 1977, petitioner filed a supplemental motion to suppress. The motion was denied, and petitioner was convicted on July 11, 1977. This record demonstrates that the delay entailed in consideration of petitioner's motions, together with the two and one-half month continuance granted at his request, account for a large portion of the delay to which he now objects. During this time, petitioner never requested an adversary hearing on the question of obscenity. In these circumstances petitioner should not be heard to complain of any First or Fifth Amendment violations regarding the denial of a prompt judicial determination on the obscenity issue. See, *e.g.*, *United States* v. *Sherwin*, *supra*, 539 F. 2d at 5 n.2, 9; *United States* v. *Glassman*, *supra*, 562 F. 2d at 957.

the seized films to be copied pending a judicial determination of the obscenity issue or in the alternative to order the films returned to petitioner. But petitioner neither sought an adversary hearing nor did he ask the court to allow him to copy the seized films.[4]

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[4]Petitioner contends (Pet. 7) that, under prevailing law in the Fifth Circuit, "a motion under [Rule] 41(e) [does] not lie for the return of seized films, seized under a warrant where no indictment ha[s] been returned." Petitioner argues that, as a consequence, he could not obtain the return of his films during the 65-day period between their seizure and his first indictment, even if he had sought relief in the district court. Petitioner relies primarily on *United States* v. *Glassman*; he refers to this case without citation in the text of his petition (Pet. 7), but in the index indicates that the case can be found at 560 F. 2d 320 (1977). This citation is incorrect and the only recent Fifth Circuit decisions with the same caption, 533 F. 2d 262 (1976) and 562 F. 2d 954 (1977), do not in any way support the proposition that courts will not grant relief on Rule 41(e) motions until after indictment. Indeed the first of these decisions, in discussing the appealability of rulings on preindictment motions under Rule 41(e), clearly implies that relief may be granted in response to such motions. Likewise, the other cases cited by petitioner, *Hunsucker* v. *Phinney*, 497 F. 2d 29 (5th Cir. 1974), cert. denied, 420 U.S. 927 (1975), and *Richey* v. *Smith*, 515 F. 2d 1239 (5th Cir. 1975), do not hold that Rule 41(e) motions before indictment are futile. See also *United States* v. *Chapman*, 559 F. 2d 402 (5th Cir. 1977). In short, during the first two months after the seizure of the films, as well as the 14½ months that followed before petitioner's conviction, he could have invoked the aid of the courts to obtain either the return of his property or an immediate determination on the obscenity issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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